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Commentary on AAA v Associated Newspapers Ltd.

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Commentary on *AAA v Associated Newspapers Ltd*

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Introduction

Once upon a time there was a larger-than-life political figure who (allegedly) fathered a child as a result of an extra-marital sexual liaison. His name cannot be revealed, for legal reasons. But, as the Court of Appeal helpfully noted in *AAA*,[1] many of the details surrounding this affair can be read about in Sonia Purnell's book, *Just Boris*.[2] Owing to the (supposedly) high degree of public interest in this man's extra-marital activities, the *Daily Mail* decided to publish the allegation pertaining to the fact of the child's paternity. It also decided to spice-up its story by publishing a photograph of the child, in order to show that the child bore a striking physical resemblance to her (alleged) father. (The hair is, apparently, unmistakeable.)

Today, many of us are familiar with the fall-out from celebrity sex scandals, which are often drawn to public prominence by the tabloid press and social media. Many quickly become subject to legal proceedings even before they break as the figure concerned seeks to prevent publication by obtaining an injunction. Where this sort of proceeding arises, the court must weigh up the interests on each side (celebrity privacy *versus* the public interest in knowing about the allegations) and endeavour to 'balance' them.[3] Of course, it is a 'balance' in name only; the winner in this 'balance' takes all.[4] But the 'balance' metaphor conjures up the ancient image of the 'scales of justice'. And this image encourages us to think about such cases in a purely bilateral way: the celebrity *versus* the press. However, where the desire to expose a miscreant public figure's misdeeds can be satiated only by intruding significantly upon the privacy of his (alleged) infant child, the bilateral image is a fundamental distortion of reality. The publication of such information clearly has an impact upon persons beyond the two key players.

AAA was an action for damages and injunctive relief in the tort known as 'misuse of private information' (MPI).[5] It was brought not by the (alleged) father but by the (anonymised) child against Associated Newspapers Ltd in an attempt to protect her own privacy interests. The claimant sought an injunction (to prevent further publication) in respect of the allegations (ie the (alleged) fact of her paternity) and the photograph of her, and damages in respect of those matters that had, by the time the action was commenced, already been published by the defendant. The (alleged) father was not a party to the action at all.

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[1] *AAA v NGN Ltd* [2013] EWCA Civ 554 [54].
[2] Sonia Purnell, *Just Boris: A Tale of Blond Ambition* (London, Aurum Press Ltd, 2012)
[3] *Re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 AC 593 [17] (Lord Steyn).
[4] Paul Wragg, 'Protecting private information of public interest: *Campbell's* great promise, unfulfilled' (2015) 7(2) *Journal of Media Law* 225.
[5] The nomenclature comes from *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 [14] (Lord Nicholls)

The injunction was sought on the basis that photographs are 'particularly intrusive'.[6] Moreover, the decision to reveal to the child the fact of her (alleged) paternity was characterised by the claimant as a classic example of private information regarding which a claimant is entitled to exercise autonomy (and, in the case of a small child, to have that autonomy exercised by an adult).

At first instance, the case was heard by Davies J in the High Court. The claimant was awarded damages for the publication of the photograph (and the defendant agreed not to republish it). However, the court found the defendant justified in publishing the (alleged) fact of her paternity. Whilst the claimant had a reasonable expectation of privacy in respect of both the photograph and the (alleged) fact of her paternity, that expectation was to be accorded a reduced weight in the 'balance' against the public interest. The reduction in weight resulted from certain actions of the child's mother (whereby she had been indiscreet, having discussed the child's paternity with friends and, on one occasion, with a man who turned out to be a high-ranking figure at *Condé Nast*). With the weight accorded to the child's privacy reduced, the 'balance' favoured publication of the (alleged) fact of her paternity (but not of the photograph).

The claimant appealed, arguing that Davies J had been wrong to find her privacy interest to carry reduced weight. For if Davies J was right, the result would seem to indicate that, under English law, a parent can effectively 'waive' the privacy right of the child. This was made all the more serious by virtue of the fact that privacy is a human right guaranteed by Article 8 of the European Convention on Human Rights (ECHR): If a parent's indiscretion could 'waive' it, that would place an onerous restriction on a fundamental right. The Court of Appeal, however, upheld the first instance decision and it is that ruling which is the subject of the rewrite that follows.

The rewritten judgment

The English law of privacy is underdeveloped and, consequently, riddled with inconsistencies and idiosyncrasies. *AAA* is worthy of detailed scrutiny because it sits at the confluence of a number of these problems and allows us to critique the way in which privacy law has developed. In a short commentary, not all of the issues worthy of study can be flagged up.[7] So I highlight one major point that is brought into the foreground by Hughes' rewritten judgment: the issue of parental 'waiver' and the relevance of the claim's contextual background.

Hughes has rewritten the judgment of the Court of Appeal. The determinations of fact made by Davies J are not readily challengeable (despite clear concerns over the judge's grasp of the chronology of events[8]). Nevertheless, the rewritten judgment is highly critical of Davies J's treatment of the 'waiver' issue, reversing her on that point. This treatment of the 'waiver' issue helpfully brings into focus different methodological perspectives on the case. For

[6] *Douglas v Hello! Ltd* [2005] EWCA Civ 595, [2006] QB 125 [84]

[7] The difficulties that courts have encountered in privacy cases in endeavouring to accommodate the 'best interests of the child' within MPI methodology is an issue I have written about elsewhere. See Thomas DC Bennett, 'Privacy, third parties and judicial method: *Wainwright's* legacy of uncertainty' (2015) 7(2) *Journal of Media Law* 251, 264-6.

[8] See para 36 of the rewritten judgment.

Hughes' fictive judge focuses heavily on the substantive (privacy) right of the child and the apparent absurdity in allowing the unwise actions of a parent to derail the rights-claim. Yet the methodology adopted by the High Court which had the effect of reducing the weight accorded to the child's claim is both broadly reflective of tort methodology across the board and, seemingly, an inevitable consequence of the doctrine known as 'indirect horizontal effect'.

A. Horizontal effect

Human rights law is typically considered to be an aspect of public law. The ECHR is binding only upon state actors, whilst section 6 Human Rights Act 1998 (HRA) creates statutory obligations to protect Convention rights that are binding only upon public bodies. Yet owing to the doctrine of 'indirect horizontal effect' (which describes how the HRA operates in disputes between individuals and/or bodies corporate), the medium through which individuals resolve privacy claims against each other or against bodies corporate is private law, not public law. In other words, one cannot bring a claim against a company alleging a human rights violation *per se*. Instead, one must bring a claim at common law to protect an existing common law right (eg a right to the non-misuse of one's private information). The Court which hears the case is a public body that is bound by the HRA to protect Convention rights. But it will discharge that obligation not by automatically ruling in the claimant's favour, but by developing the common law incrementally in order to ensure that both parties' Convention rights are accorded sufficient protection 'indirectly' by the common law to discharge the UK's Convention obligations.[9]

Unfortunately, the common law develops rather haphazardly in a piecemeal fashion. It is shaped solely by the circumstances that are brought before the courts. The methodology the courts use to decide these cases is the methodology of the particular common law cause of action being pleaded. Thus in a misuse of private information case, the courts will first ask whether the claimant had a 'reasonable expectation of privacy' in respect of the information complained-of ('Stage 1'). If such a reasonable expectation is found to exist, the courts will move to 'Stage 2': the 'ultimate balancing test'.[10] At Stage 2, the courts will endeavour to 'balance' the competing interests of the parties in a fact-sensitive exercise involving 'an intense focus on the comparative importance of the specific rights being claimed'.[11]

B. Fact-sensitivity in tort law

Fact-sensitivity is not only required in MPI cases (by virtue of the 'intense focus' mandated by *Re S*); it is a hallmark of English tort law generally. For individuals cannot claim private law rights in a vacuum; rights at common law arise out of particular circumstances and fact patterns.[12] The right to privacy, whilst rather abstract in the language of the Convention, has been developed in a far more concrete fashion in England. This is perhaps most apparent when one considers that the common law in England has long rejected a broad 'right to privacy'[13] in favour of more narrowly focused rights (eg to confidentiality,[14] to non-misuse of private information,[15] to freedom from the intentional infliction of psychiatric harm[16]).

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[9] Gavin Phillipson and Alexander Williams, 'Horizontal Effect and the Constitutional Constraint' (2011) 74(6) *MLR* 878

[10] *Re S (A Child)*, above n3 [17]

[11] ibid

[12] See eg *Qualcast (Wolverhampton) Ltd v Haynes* [1959] AC 743, 755 (Lord Keith of Avonholm)

[13] *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406

The 'waiver' issue comes to the fore at paragraph 25 of the rewritten judgment. Then, at paragraph 28, Hughes' fictive judge asserts that (a) it would be 'unconscionable' if the human right of one person could be waived by the actions of another, (b) that there is no basis for departing from that position simply because the claimant is a child, and (c) that to suggest otherwise is to undermine the fact that the child has her own rights under international and domestic law.

Hughes' fictive judge's view is that, if the substance of my human rights is to be taken seriously, it ought to make no difference what someone else has said or done in respect of them. For if another person is able to say or do something that ends up derailing my claim – because I no longer have a sufficiently strong reasonable expectation of privacy – then my rights have been, in substance, 'waived'.

The ECHR makes no distinction on its face between adults' and children's rights. Indeed, the Strasbourg Court has held that a new-born infant has full privacy rights under Article 8.[17] But the common law of England – the only mechanism open to us for the securing of Convention rights against private parties – does. Consider the case of *Dobson v Thames Water* – a case in the tort of nuisance.[18] In that case, a child was denied damages for nuisance whilst his parents were permitted to recover. The reason was that the common law does not permit claims for private nuisance to be brought by children since they cannot have a legal interest in the affected land. The Court of Appeal found that this did not give rise to a breach of its obligations to secure protection for the child's Article 8 interests because the damages awarded to the parents would cover any loss of amenity suffered by the child as well. Consider what would have happened, however, had the parents *not* pursued a claim in respect of their own suffering. Inevitably, the child would have had no remedy. The parents would, in a sense, have 'waived' the child's right to non-interference with his family life by deciding against bringing their own claim.

This approach is not limited to nuisance cases. In *O v A*, the Court of Appeal rejected a claim in negligence by the child of a well-known performing artist.[19] The child sought to restrain the publication of the defendant's autobiography (which contained graphic accounts of sexual abuse the defendant had suffered). The claim was brought on the basis that, if the claimant read it, he might be caused severe psychological distress. The Court of Appeal essentially held that parents are immune from suit in negligence in respect of decisions made pertaining to their offspring's upbringing. Whatever one makes of that ruling (and it is certainly a questionable reading of negligence law generally), we may at the very least take it as authority for the proposition that a parent may not be sued for making the decision to publish a book that might distress their child. Once more the parent might be said, in this sense, to have 'waived' the child's right to freedom from psychological distress.

C. An alternative perspective on 'waiver'

O and *AAA* could, however, be seen as cases where the parent's actions form part of the contextual background to which the court has regard when focusing intensely on the rights-

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[14] *Stephens v Avery* [1988] FSR 510
[15] *Campbell*, above, n5
[16] *Wilkinson v Downton* [1897] 2 QB 57; *Rhodes v OPO (O v A)* [2015] UKSC 32, [2015] 2 WLR 1373
[17] *Reklos v Greece* [2009] EMLR 290.
[18] *Dobson v Thames Water Utilities Ltd* [2007] EWCA Civ 28, [2009] 3 All ER 319
[19] *O v A (previously OPO v MLA)* [2014] EWCA Civ 1277, [2015] EMLR 4

claim. If this were so, then we would have cause not to regard these as instances of 'waivers' at all. Tort claims are brought into focus by examining them against the factual backdrop against which they arise. What is unique about the reasonable expectation of privacy of a young child is that it must be attributed to the child; it is a constructive expectation. This is because young children may not be able to hold, and certainly are in no position to articulate, an *actual* expectation of privacy. In circumstances where the parents take steps to shield the child from intrusion, the courts see this background as enhancing privacy.[20] Since, logically, the background might go the other way (as in *AAA*), Hughes' fictive judge is pressed into an attack on this aspect of *Murray* (at [28]). Such an attack, however, downplays the relevance of the contextual background. Hughes' judgment argues that *Murray* is wrong on this point. In the alternative, she argues that if *Murray* is indeed binding, its precedential effect should be limited to 'cases concerning photographs of a child in a public place.'[21]

This approach to the use of precedent is reminiscent of Perry's 'weak Burkean conception' of adjudication.[22] A court adjudicating in the weak Burkean mode regards precedent as binding only when the outcome it prescribes is itself desirable.[23] Since Hughes' fictive judge finds that the effect that *Murray* would, if followed, have on *AAA* is undesirable – leading as it does to this apparent 'waiver' of her privacy – she is not minded to apply it. Such an approach, however, if consistently adopted, risks diminishing the value of precedent. For 'it obviously takes very little to overcome the binding force of an earlier case.'[24] The courts might then, in short order, find themselves mired in Tennyson's 'wilderness of single instances'.[25]

There are other reasons why the relevance of the contextual background is important. It may play a role in establishing harm – normally a pre-requisite for liability in tort (although this has never been conclusively analysed by the courts). Stage 1 of the MPI methodology goes some way to fulfilling the harm requirement; only if there is a reasonable expectation of privacy to violate can harm be thereby occasioned. This is certainly imperfect. For as Eric Descheemaeker has observed, there is no consensus in MPI doctrine as to when harm is occasioned (that is, whether it is contingent upon, or inherent within, the violation of the privacy right itself).[26] Assuming, however, that there must be some sort of harm in order for an act to be tortious, and further that (like most of English tort law) MPI follows what Descheemaeker terms a 'bi-polar' model of harm (that is, harm being causally contingent upon a rights violation), it makes sense to regard the establishment of a reasonable expectation of privacy as a necessary first step in setting the scene for harm to be occasioned.[27] With that in mind, it becomes apparent that the contextual background is relevant to determining whether there is something worth protecting present. For this reason, the courts refuse relief for the publication of trivial information – a certain threshold of sensitivity must be reached before a reasonable expectation of privacy can be established.[28]

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[20] *Murray v Express Newspapers plc* [2008] EWCA Civ 446; [2009] Ch 481.
[21] Para 29.
[22] Stephen R Perry, 'Judicial Obligation, Precedent and the Common Law' (1987) 7(2) *OJLS* 215.
[23] According to Perry, the weak Burkean conception of adjudication 'would regard a court as being bound by a previous decision, itself decided on the basis of a balance of reasons, only until such time as it was convinced both that the balance of reasons had been wrongly assessed on the prior occasion, and that the correct assessment in fact led to the opposite result.' See ibid 221-2.
[24] ibid
[25] Lord Alfred Tennyson, *Aylmer's Field* (1793)
[26] Eric Descheemaeker, 'The Harms of Privacy' (2015) 7(2) *Journal of Media Law* 278
[27] ibid 279
[28] *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 (QB) [27]

Likewise, where information has already appeared in the public domain such that there can be no reasonable expectation that it will be kept private, we might rationalise the courts' refusal to provide relief on the basis that further publication will not engender any further harm. (Incidentally, the courts' approach to interim injunctions in MPI fits very well with this rationalisation, since they will be granted even where information is already in the public domain if they can serve the useful purpose of preventing some further harm.[29])

The contextual background thus provides the backdrop against which the rights-claim can be elucidated and considered. In the view of Davies J, the mother in *AAA* has acted in a way that impacts upon the background to the claim to such an extent that some of what may harm the child (in terms of revelations) has already occurred in a non-tortious fashion. The weighting Davies J attached to the mother's actions in calculating their impact upon the child's claim might be criticised, but the overarching method is entirely consistent (formally) with generally applicable tort methodology. Hughes' preferred approach issues a broader challenge to established tort method. Therein lies the value of this rewrite.

The value of the rewritten judgment

It may or may not be desirable that the actions of parents in situations such as these are considered by the courts as part of the background against which the rights-claim is judged. But that is a normative issue – one which Hughes' rewritten judgment brings into the foreground. For the doctrine of indirect horizontality places us in a situation where the only available mechanism for the determination of Article 8 (privacy) claims between non-state actors is tort law. And tort comes with its idiosyncrasies – including its heavy fact-sensitivity and its determination to focus closely on the contextual background to the claim.

The desirability of the result – the apparent 'waiver' of the child's rights – is inseparable from the model of application (indirect horizontality) that the courts have given to the HRA. Criticism of the former must entail criticism of the latter. Hughes' judgment thus does contemporary domestic human rights scholarship a significant service by pointing out a consequence of indirect horizontality that, despite the seemingly exhaustive debate that ensued around the HRA's possible models of application in the early 2000s, seems not to have been foreseen.

We are now at a point where the government of the day plans to introduce legislation to repeal the HRA and replace it with a 'British Bill of Rights'. Although it seems unlikely that the content of the rights contained in the new Bill will emanate from the ECHR, the Bill will still have to grapple with the issue of horizontality. This is because its purpose will be to impose higher-order rights norms onto lower-order private law. The model of horizontality that is to be adopted ought to form part of the debate when it becomes time to draft the new Bill. And the case of *AAA* is particularly prescient, for it highlights some of the less foreseeable consequences of the indirect horizontal method. Given this, and the implications for the substance of children's rights that inevitably flows from making these – often disconnected – methodological decisions, the timing of this rewritten judgment could not be more appropriate.

[29] *CTB v News Group Newspapers Ltd* [2011] EWHC 1326 (QB) [19].